In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1316

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, AND FRANK CORN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (Pet. App. 9a–41a) is reported at 309 F. Supp. 887. That court's Findings of Fact and Conclusions of Law and Additional Findings (Pet. App. 42a–72a, 79a–82a) are not reported. The opinion of the court of appeals (Pet. App. 85a–96a) is reported at 432 F. 2d 1286.

JURISDICTION

The judgment of the court of appeals (Pet. App. 97a) was entered on October 16, 1970, and a petition for rehearing was denied (Pet. App. 98a) on Novem-

ber 9, 1970. The petition for a writ of certiorari was filed on February 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, condemnation of certain lands was a permissible taking under the statute authorizing construction of the Benbrook Dam and Reservoir project.

STATUTE INVOLVED

The relevant provisions of the Act of March 2, 1945 are set forth in Pet. App. A 1a–5a.

STATEMENT

In 1945 Congress authorized construction of Benbrook Dam and Reservoir as follows (Act of March 2, 1945, c. 19, 59 Stat. 10, 18):

> The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized in accordance with the reports contained in House Document Numbered 403, Seventy-seventh Congress * * *.

Pursuant to this authorization, the government in 1950 instituted condemnation proceedings to obtain the land needed for the project. Included in the property sought by the government were 1,207 acres owned by Sid W. Richardson. (Pet. App. E 86a.)

In his declaration of taking with respect to the Richardson property, the Secretary of the Army stated that the taking was required for public use "for the construction and operation of Benbrook

Dam and Reservoir on the Clear Fork of the Trinity River in Trinity River Basin, Texas." Richardson objected to the taking on the grounds that the proposed construction departed from the authorized project specifications and that portions of the land were earmarked for recreational use, a purpose not within the congressional authorization. (Pet. App. E 86a–87a.)

By agreement, the parties submitted to the district court (sitting without a jury) only the question of the government's right to take. The Court found that Richardson had waived his right to contest the taking of portions of his property, but sustained his claim as to the balance (some 647 acres), concluding that the taking of that portion was unauthorized for both of the reasons put forth by Richardson.[1] (Pet. App. B, 9a–41a; Pet. App. C, 42a–82a; Pet. App. D. 83a–84a.)

The court of appeals reversed (Pet. App. E 85a–96a). It noted (Pet. App. E 88a) that under well-settled doctrine "the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the * * * project." Instead a taking should be found to be "unauthorized" only if "no reasonable man could conclude that the land sought to be condemned had some association with the authorized project" (Pet. App. E 91a). As to Richardson's recreational purpose argument, the court

[1] Richardson died while the case was being litigated, and the representatives of his estate were substituted as parties. Pet. 4, n. 2.

concluded that there was no evidence from which a court could properly find that taking of the land in question was not authorized, and that in any event a taking for recreational development was an allied purpose within the statutory authorization (Pet. App. E 91a, 93a–94a). In rejecting Richardson's other contentions, the court held that the statutory authorization permitted deviations from the plans presented to Congress, that the modifications made during construction of the Benbrook project were proper, and that the project as built, and the condemnations with respect thereto, were authorized (Pet. App. E. 94a–96a).

ARGUMENT

1. Petitioners ask this Court to review again their contention that the taking was for recreational purposes and thus not within the statutory authorization for "navigation, flood control, and allied purposes" (Pet. 12–20).[2] The court below, however, limited its inquiry to whether the taking was associated with the Benbrook project and, finding no evidence to the contrary, upheld the taking.

This approach comports with this Court's admonition in *Berman* v. *Parker*, 348 U.S. 26, 35–36:

[2] Petitioners' claims (Pet. 13–14) as to the significance of the issues here raised are not well-founded. The dramatic increase in federal lands between 1956 and 1970 shown by petitioners is due almost entirely to the perhaps inadvertent omission from the 1956 figures of Alaskan acreage. With Alaska included, the government in 1956 owned some 34.1 percent of all lands, not the 21.4 percent suggested by petitioners, as compared with 34.3 percent in 1970. See Report of the Director of the Bureau of Land Management, 1956, Statistical Appendix, p. 4, Table No. 3. Moreover, "less than 1 percent of the land now under Gov-

> * * * The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. * * *
>
> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. * * *[3]

Accord, *West, Inc.* v. *United States,* 374 F. 2d 218 (C.A. 5); *Wilson* v. *United States,* 350 F. 2d 901 (C.A. 10); *United States* v. *91.69 Acres of Land in Oconee County, South Carolina,* 334 F. 2d 229 (C.A. 4).

Petitioners rely on *Catlin* v. *United States,* 324 U.S. 229, for the proposition that the landowner is entitled to challenge the validity of the taking for departure from the purpose authorized by statute. But *Catlin* held only that the order there under review was not a final decision and was thus not appealable. And, as the court below noted (Pet. App. E 90a–91a), this Court's subsequent opinion in *Berman* clearly shows that the *Catlin* opinion "used the term 'purpose' in the sense of the overall project rather than in the sense

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ernment ownership was obtained through purchase, condemnation, gift or exchange." *Public Land Statistics 1969*, U.S. Dept. of the Interior, p. 1.

[3] The Court in *Berman* of course recognized that Congress could not itself determine all the details of each condemnation and that the requisite discretion would necessarily extend to "Congress and its authorized agencies." See 348 U.S. at 34.

of some minor part of the project." The present taking is not at odds with the statutory purpose, in this broader sense, of the Benbrook project.[4]

Moreover, as the Fifth Circuit further held, even under petitioners' view the taking was authorized, since recreational development is an "allied" purpose within the statutory language. When Congress approved the Benbrook project, it was already the established federal policy that recreational facilities be provided along with federally-constructed reservoirs. See Act of December 22, 1944, c. 665, § 4, 58 Stat. 887, 889, set out at p. 9 *infra*.[5]

2. Nor is there merit in petitioners' claim that the Benbrook project as a whole was unauthorized because of the difference between the project as proposed and the project as actually built (Pet. 22–25). This contention is answered fully in the Fifth Circuit's opinion (Pet. App. E 94a–96a). As that court noted, Congress approved only a general, preliminary plan of the project; it intended that such modifications be made as later studies indicated were necessary.

[4] Nor, as petitioners contend (Pet. 17–18), does the decision below conflict with that of any other court of appeals. In *Maiatico* v. *United States*, 302 F. 2d 880 (C.A.D.C.), the land sought was not within the area to which Congress had carefully limited the condemnation authority; by contrast, in the present case petitioners' attack goes to the *purpose* of the taking, and admittedly the *area* of taking involves broad discretionary authority. *Higginson* v. *United States*, 384 F. 2d 504 (C.A. 6), expressly noted that the right of the landowner to challenge the taking "as not being for the prescribed statutory purpose * * * is not in issue in the instant case * * *" (384 F. 2d at 507).

[5] It is immaterial that neither the declaration of taking nor the complaint cited this statute. See *United States* v. *Certain Land in Fairfax County, Virginia;* 345 U.S. 344, 347–348; *United States* v. *Catlin*, 204 F. 2d 661, 663 (C.A. 7).

This was in accord with long-standing congressional policy. See House Committee on Rivers and Harbors, H. Rep. No. 2165, 79th Cong., 2d Sess. 4 (1946).[6] And the changes that were actually made did not alter the area served or the project purposes.[7] In these circumstances the court below correctly held that the project as actually constructed was authorized.[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Contrary to petitioners' assertion (Pet. 24), 33 U.S.C. 701b–8 and 701m do not limit the authority of the Chief of Engineers, but rather grant him additional authority in certain circumstances where the statutory approval was incomplete. In the present case, the congressional authorization of the Benbrook project was sufficient for completion of construction without additional legislation.

[7] Moreover, Congress certainly was aware of the increased project costs which petitioners note (Pet. 23) and the changes from which they resulted, since it appropriated funds annually for the project's construction—thereby ratifying the modifications in design and location. See *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293–294.

[8] Petitioners suggest (Pet. 21–22) that even under the limited review permitted by *Berman*, the Fifth Circuit should have found the taking here unauthorized. This contention goes essentially to the Fifth Circuit's weighing of the facts and circumstances of this case, and is not a matter warranting consideration by this Court.

APPENDIX

Act of Dec. 22, 1944, § 4, 58 Stat. 887, 889–890, provides:

> The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided,* That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be per-

mitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

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